

**IN THE INCOME TAX APPELLATE TRIBUNAL
Pune Bench "B", Pune**

**Before Shri I.C. Sudhir Judicial Member
and Shri D. Karunakara Rao Accountant Member**

**ITA Nos. 455 to 458/PN/2010
(Asstt. Years : 2001-02, 2002-03, 2003-04 & 2004-05)**

Akil Gulamali Somji ... **Appellant**
Shop No. 16, Gulistan Complex,
Opposite SPCA, Poona College Road,
Pune 411 001
PAN ADIPS 8077 Q

v.

Income Tax Officer Ward 4[5], Pune ... **Respondent**

Appellant by : Shri Sunil Ganoo
Respondent : Ms. Ann Kapthuama
Date of Hearing : 15/02/12
Date of Pronouncement : 30-3-12

ORDER

Per I.C. Sudhir, JM

In these appeals, the assessee has questioned first appellate order mainly on two issues. Firstly the validity of assessment order in absence of approval of the Joint Commissioner of Income Tax as provided u/s. 153D of the Act and secondly, the validity of addition of the amount made by A.O. u/s. 69C of the Act on account of unexplained expenditure of interest and brokerage paid by the assessee and other additions.

2. The Ld. A.R. preferred to advance his argument on legal issue. Since it goes to the root of the matter, we allowed the parties to advance their argument on the legal issue to adjudicate it first.

3. The contention of the Ld. A.R remained that while framing assessment u/s. 153 C of the Act against the assessee, the ITO has failed to obtain necessary approval of the Joint Commissioner of Income Tax to the impugned assessment orders as provided u/s. 153 D of the

Act, hence assessment orders in question are bad in law and deserve to be annulled. He submitted that Sec. 153 C of the I.T. Act 1961 prescribes that the income of the person to whom notice has been served u/s. 153 C shall be assessed in accordance with the provisions of Sec. 153 A of the I.T. Act 1961. Therefore, the assessment has to be framed u/s. 153 A of the Act and not u/s. 153 C. The first proviso as well as clause (ii) of Second proviso to Sec. 153 B (1) specify the time limit for completion of assessment u/s. 153A in respect of person to whom notice is issued u/s. 153 C of the Act. Therefore, conjoint reading of Sec. 153 A, Sec. 153 B and Sec. 153 D makes it clear that the approval as prescribed u/s. 153 D is also required to be obtained in cases where notice u/s. 153 C had been served, the assessments are to be framed u/s. 153 A. The Ld. A.R. submitted that even the Memorandum explaining the provisions of Finance Bill 2007 speaks that approval u/s. 153 D is also to be obtained in case of other person as referred to Sec. 153 C. In support, he drew our attention to page No. 338 (Statute) of volume 289 ITR. He submitted that the word "approval" has been defined in Black's Law Dictionary -VIth Edition as the act of confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. Approval implies knowledge and exercise of discretion after knowledge. The Sec. 153 D uses word "shall" which indicate that the provisions are mandatory especially when the Section further prescribes as "that except with the prior approval of the Joint Commissioner no order shall be passed". Therefore in the absence of approval of Joint Commissioner, the order passed by the I.T.O. is not a valid and legal order and therefore has no legal force. He contended that in the eye of law an order passed without such approval is a nullity.

4. The Ld. A.R. submitted further that the provisions of Sec. 153 C of the I.T. Act 1961 are analogous to the provisions of Sec. 158 BD of the Act. The Manual of Office Procedure Volume II published in February 2003 by Directorate of Income Tax (Organization and Management Services) C.B.D.T. vide Page No.2 has prescribed procedure to be followed in case of Block Assessment. A copy thereof has been furnished. The Ld. A.R. submitted that approval of senior authority provided to avoid arbitrary, high pitched assessments being framed and hence the approval is mandatory. The object of enacting Sec. 153 D is one of general policy and hence it is mandatory. In support, he placed reliance on the decision of Hon'ble Supreme Court in the case of Kirshan Lal Vs. J & K, 1994-(SC2)-GJX-0264-SC.

5. The Ld. A.R. submitted that it is a well settled law that if the Statute prescribes that a particular thing is to be done in a particular manner, it is to be done in that manner only. An order passed without an authority is nullity and the same is to be annulled. He placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT Vs. Mrs. Ratnabai N.K. Dubhash, 230 ITR 495 (Bom.). He submitted that the assessment cannot be restored to the A.O to follow the prescribed procedure because the time limit to frame the assessment has already expired and extended time limit cannot be given otherwise the limitation provision will be frustrated. He submitted that in cases where the provisions of Sec. 153 D are not followed and if the assessments are set aside to remove the illegality, wide gates would be opened for the department to get extended time limit by passing orders without following the procedure prescribed u/s. 153 D and indirectly will get the extended time limit for completion of assessment. He submitted that it is a well settled law that what cannot be directly done cannot be done by

following circuitous way. He referred decision of Hon'ble Bombay High Court in the case of CIT Vs. Mrs. Ratnabai N.K. Dubhash (Supra) in this regard.

6. The Ld. D.R. on the other hand tried to justify the validity of assessment order in question. He submitted that Sec 153 D talks of only approval of the Joint Commissioner of Income Tax for assessment order passed u/s. 153A of the Act. He contended that even if for the sake of argument it is accepted that A.O failed in his mandatory duty of obtaining prior approval, we have to go back to legislative intent behind the relevant Section. The Ld. D.R. submitted that the purpose of approval is to avoid high pitched assessment and inconvenience to the assessee. This pre-supposes the participation of both the A.O and assessee in the process of assessment. In the present case, all the assessments for 4 years has been passed u/s. 153 C read with Sec. 144 which itself implies that there was lack of co-operation from the assessee during the course of assessment proceedings on various counts. Similarly, even during the appellate proceedings, there has been no appearance of the assessee before the Ld CIT(A) and there was no compliance to statutory notices. The Ld. D.R. placed reliance on the following decisions to support her argument that A.O is well within the jurisdiction to continue with the proceedings from the stage at which the illegality has occurred :

- 1) Guduthur Bros. Vs. ITO, TC49R, 480 (SC)
- 2) Gayathri Textiles Vs. CIT, (2000) 243 ITR 674 (Kar)
- 3) CIT Vs. Sara Enterprises, (1997), 224 ITR 169 (Mad)
- 4) CIT Vs. Sardarilal Bhashi (1989), 179 ITR 307 (M.P)
- 5) Prabhudayal Amichand Vs CIT (1989), 180 ITR 84 (M.P)
- 6) CIT Vs. Damodardas Murarilal (1996), 222 ITR 401 (M.P)

7. In an alternative submission, the Ld. D.R. requested to set aside the file to the A.O or Ld CIT(A), so that defect in not obtaining the approval of the Joint Commissioner of Income Tax can be cured. She submitted further that Tribunal is also not bound by constraints of limitation and therefore, it is prayed that the file may be set aside to the lower authorities for necessary action.

8. On query raised by the Bench, the Ld. A.R. submitted that the provisions of Sec. 153 D of the Act are mandatory. He submitted that it is a well settled law that in determining the question, as to whether the provision is mandatory or directory, the subject matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act, are required to be looked into. He placed reliance on the following decisions :

- 1) Re Presidential Poll reported in 1974- [SC2]-GJX-0912-SC
- 2) Govindlal Chhaganlal Patel Vs. The A.P.M.C. reported in 1975-[SC2]-GJX-0313 SC.
- 3) Krishan Lal Vs. State of J & K reported in 1994-[SC2]-GJX-264-SC (SC)
- 4) Dharendra Nath Gorai and others v/s Sudhir Chandra Ghosh & others reported in 1964-[SC2]-GJX-0060-SC.

9. The Ld. A.R. submitted that the Sec. 153D has been enacted for the benefit of general class of the assesseees in whose case the assessments in pursuance of the search and seizure action are to be completed. Since the Section starts by negative words, the provision becomes mandatory, submitted the Ld. A.R.

10. He submitted that in absence of approval of the Joint Commissioner of Income-tax obtained on the assessment order in question, the

assessment order be treated as null and void. He placed reliance on the following decisions :

- 1) Balvant N. Vishwamitra and others Vs. Yadav Sadashiv Mule, reported in 2004-[SC4]-GJX-0636 SC.
- 2) Rajendra Kumar Verma Vs. D.G.I.T., reported in [2011] 9 Taxmann.com 85[All].
- 3) M/s. Rolson International Vs. A.C.I.T, reported in 2001[ID1]-GJX-1089 TBOM.
- 4) Khubeshwar Prasad Singh Vs. State of Bihar, reported in 2007-[SC2]-GJX-0241 SC
- 5) C.I.R. Vs. SPL's Siddhartha Ltd reported in ITATONLINE.org.

11. We have considered the above submissions and have gone through the decisions relied upon by the parties in view of orders of the authorities below and material available on record. The relevant facts are that during the course of search and seizure action on 29.7.2003 at the business and residential premises of Mr. Shriram Soni, certain documents belonging to the assessee were found and seized. Notice u/s. 153C was issued to the assessee and assessment u/s. 153C r.w.s. 144 have been framed for all the 4 A.Ys. under consideration. Before the Ld CIT(A), the assessment orders were questioned both on legal issue and on merits. On legal issue, the validity of assessment orders in absence of approval obtained u/s. 153 D of the Act of Joint Commissioner of Income Tax has been questioned. On merits additions made by the A.O were impugned. Since the assessee could not succeed in its appeal, the present appeals have been preferred in questioning the first appellate orders.

12. On perusal of the provisions laid down u/s. 153C of the Act, it is apparent that after issuance of notice u/s. 153C, the A.O having jurisdiction over such other person (against which incriminating material

has been found during the course of search conducted on a person) arose or re-assess income of such other person in accordance with the provisions of Sec. 153A. Sec. 153B talks about time limit for completion of assessment u/s. u/s. 153A, whereas S. 153D, talks about necessity of prior approval for framing assessment in case of search or requisition. We thus fully concur with the submission of the Ld. A.R. that provisions laid down u/s. 153D are very much applicable in case of assessment of income of any other person (i.e. the person other than the person searched). Now the issue for our adjudication is as to whether absence of obtaining prior approval u/s. 153D of Joint Commissioner of Income Tax, assessment made u/s. 153 C will make the assessment void or voidable/curable. For a ready reference, provisions laid down u/s. 153D of the Act are being reproduced hereunder :

“153D. No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of [sub-section (1) of] section 153A or the assessment year referred to in clause (b) of sub-section (1) of section 153B, except with the prior approval of the Joint Commissioner].”

The above provisions u/s. 153 D have been laid down under the heading “prior approval necessary for assessment in cases of search or requisition”. This heading itself suggests that obtaining prior approval the assessment in cases of search or requisition is necessary. We further note that the provisions u/s. 153D start with a negative wording “no order of assessment or re-assessment” supported by the further wording “shall” makes the intention of the Legislature clear that compliance of Sec. 153D requirement is mandatory. No universal rule can be laid down as to whether mandatory enactment shall be considered directory or

obligatory with an implied nullification for disobedience. As per the decision of Hon'ble Supreme Court in the cases of Banwarilal Agarwalla Vs. State of Bihar, AIR 1961 SC 849 (853); Razas Bulland Sugar Co.Ltd., Vs. Municipal Board, AIR 1965 (SC) 895 (899) & Others if object of the enactment will be benefited by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory, serious general inconvenience will be created to nascent persons without very much further object of enactment, the same will be construed as directory. But all these does not mean that language used is to be ignored, only that the prima facie inference of the intention of the legislature arising from the words used may be displaced by considering the nature of the enactment, its designed consequences flowing from alternative constructions. The wordings and language used in Sec. 153D of the Act and the heading "prior approval necessary for assessment in cases of search or requisition" under which, Sec. 153D has been provided do not leave an iota of doubt about the very intention of the legislature to make the compliance u/s. 153D a mandatory. There is no dispute that if a provision is mandatory, an act done in breach thereof will be invalid, but, if it is directory, the act will be valid although non-compliance may give rise to some other penalty if provided by the Statute. The general rule that non-compliance of mandatory requirements results in nullification of the Act is subject at least to one exception. If contain requirements or conditions are provided by a statute in the interest of a particular person, the requirements, or conditions although mandatory may be waived him if no public interest are involved and in such case, the act done still be valid even if the requirement or condition has not been performed. Here, before us, is not a case where consent of assessee will waive the condition of obtaining prior approval u/s. 153D of the Joint Commissioner of Income Tax by the A.O for framing

assessment u/s. 153C/ 153A of the Act. Condition of prior approval of JCIT u/s. 153D has been put in public interest and not in the interest of a particular person. Thus it cannot be waived by particular person. The use of word "shall" raises a presumption that a particular provision is imperative but this prima facie inference may be reverted by other consideration such as object and scope of the enactment and consequence flowing from such construction. The revenue has not been able to rebut the above inference by pointing out other consideration like object and scope of the enactment and the consequence flowing from such construction before us. Clause 9 of Manual of Office Procedure, Volume II (Technical) February 2003 issued by Directorate of Income Tax on behalf of Central Board of Direct Taxes, Department of Revenue, Government of India, reads as under :

*"9. **Approval for assessment** : An assessment order under Chapter XIV-B can be passed only with the previous approval of the range JCIT/ADDL.CIT. (For the period from 30-6-1995 to 31-12-1996 the approving authority was the CIT.) The Assessing Officer should submit the draft assessment order for such approval well in time. The submission of the draft order must be docketed in the order-sheet and a copy of the draft order and covering letter filed in the relevant miscellaneous records folder. Due opportunity of being heard should be given to the assessee by the supervisory officer giving approval to the proposed block assessment, at least one month before the time barring date. Finally once such approval is granted, it must be in writing and filed in the relevant folder indicated above after making a due entry in the order-sheet. The assessment order can be passed only after the receipt of such approval. The fact that such approval has been obtained should also be mentioned in the body of the assessment order itself."*

Chapter XIVB also deals with assessment of search cases. Sections 153A, 153B & 153 C have been introduced to Chapter XIV "procedure for

assessment" w.e.f. 1.6.2003 by the Finance Act 2003 whereas Sec. 153 D has been inserted to the Chapter w.e.f. 1.6.2007 by the Finance Act 2007. These provisions thus also deal with the assessment in case of search or requisition and when the assessment orders in the present case were passed the provisions laid down u/s. 153D were very much in operation. In the present case, assessments in question have been framed on 27.12.2007.

13. In the case of CIT Vs. Ratnabai N.K. Dubhash (Mrs.) (Supra), the difference between cancellation and amendment of assessment in view of the provisions of Sections 143, 144B, 153 and 251 of the I.T. Act 1961 has been dealt with. The Hon'ble High Court has been pleased to hold as under :

"In view of the above discussion, we are of the clear opinion that incases falling under section 144B of the Act, the quasi-judicial function of the Income-tax Officer as an assessing authority comes to an end themoment the assessee files objections to the draft order. The power to determine the income of the assessee thereafter gets vested in the Inspect-ing Assistant Commissioner to whom the Income-tax Officer is required to forward the draft order together with objections. The only thing that remained to be done by the Income-tax Officer is to pass a final order in accordance with the directions given by the Inspecting Assistant Commissioner. The function of the income-tax Officer to make the final assessment under section 144B(5) of the Act is more in the nature of a ministerial function because he can pass the order only in accordance with the directions of the Inspecting Assistant Commissioner. He cannot vary ordepart from the directions given by the Inspecting Assistant Commissioner. Moreover, the requirements of section 144B of the Act re mandatory. The Income-tax Officer has no option but to follow the same. He cannot make the final order on the basis of the draft order without forwarding the same to the Inspecting Assistant Commissioner along with the objections and without obtaining the directions of the Inspecting Assistant Commissioner. An assessment made by the Income-tax Officer in violation of the provisions of section 144B of the Act would be an assessment without jurisdiction. In the instant case, the admitted position is that on receipt of the draft

order of assessment, the assessee did file objections and the Income-tax Officer completed the assessment himself on the basis of the draft order without forwarding the draft order and the objections to the Inspecting Assistant Commissioner and obtaining directions from him. Such an order, on the face of it, is beyond the powers of the Income-tax Officer under section 143 read with section 144B of the Act and, hence, without jurisdiction. The Tribunal, in our opinion, was, therefore, justified in its conclusion that the assessment was liable to be annulled. It was right in holding that the assessment order passed by the Income-tax Officer the instant case without reference to the Inspecting Assistant Commissioner had rightly been annulled by the Commissioner of Income-tax (Appeals). In view of the above, we answer the question referred to us accordingly in favour of the assessee and against the Revenue.

This reference is disposed of accordingly with no order as to costs."

14. In the case of CIT Vs. SPL's Siddharth Ltd. (Supra), before the Hon'ble Delhi High Court, the facts were that notice issued by the A.O u/s. 147 r.w.s 148 of the Act for re-opening the assessment for the A.Y. 2002-03 was set aside by the Tribunal on the ground that the requisite approval of Addl. Commissioner of Income Tax, which is mandatorily required, was not taken. Since 4 years had elapsed from the end of the relevant A.Y, the A.O u/s. 151(1) of the Act was required to take approval of the competent authority. The Hon'ble Delhi High Court after discussing the issue in detail and the case laws cited before it has been pleased to approve the decision of Tribunal. In view of these decisions and the position of law provided u/s. 153D of the Act, we hold that the assessment orders impugned framed in absence of obtaining prior approval of the Joint Commissioner for the A.Ys. under consideration are invalid as null and void and are quashed accordingly.

15. The decisions relied upon by the Ld. D.R are having different facts and issue, hence are not helpful to the revenue. In the case of Guduthur Bros. Vs. ITO (Supra) the levy of penalty without affording a hearing to the assessee was questioned before the appellate authority, who set aside that order. The matter ultimately travelled to the Hon'ble Supreme Court and it was held that the ITO was well within his jurisdiction to continue the proceedings from the stage at which the illegality has occurred and to assess the appellants to a penalty, if any. Before the Hon'ble M.P. High Court in the case of CIT Vs. Sardarilal Hasim (Supra), the issue was regarding applicability of prescribed limitation u/s. 275 in a penalty order passed after the case is remanded by an appellate authority. The Hon'ble Court was pleased to hold that the limitation prescribed u/s. 275 of the Act is not applicable to the penalty order passed after the case is remanded by an appellate Authority. In the case of Gayatri Textiles Vs. CIT (Supra) non-obtaining of prior approval of I.A.C u/s. 271(1)(c) (iii) for direction for payment of penalty was held as procedurally defective. The provisions laid down u/s. 153D of the Act under consideration in the present case before us, are different as here the prior approval of Joint Commissioner is not required merely for direction for payment of the due amount of tax but overall approval of the assessment framed by the I.T.O. Thus, the cited decision is not applicable in the present case. In the case of CIT Vs. Sara Enterprises (Supra), the issue was as to whether the bar of limitation contained u/s. 275 of the Act would attenuate or curtail the powers of CIT, vested in him u/s. 263 of the said Act. The Hon'ble Madras High Court was pleased to hold that it is not hit by provisions of Sec. 275 of the Act. In Prabu Dayal Amichand Vs. CIT (Supra), the Hon'ble High Court of Madhya Pradesh with reference to Sec. 271(1)(c) of the Act was pleased to hold that a procedural irregularity not involving the question of jurisdiction

can be cured. It is not helpful to the revenue in the present case because in the present case, the A.O was having no jurisdiction to frame assessment order without prior approval of JCIT as necessary requirement to comply with u/s. 153D of the Act. In the case of CIT Vs.Damodhar Muralilal (Supra), the Hon'ble High Court did not approve the view of the Tribunal in holding that in view of Clause (b) of Sec. 251(1) of the Act, the first appellate authority had no power of remand and therefore, the procedural illegality would not be corrected by recourse to remanding the case to the ITO. Here in the present case, as we have already discussed, and also cited the recent decision of Hon'ble jurisdictional Bombay High Court in the case of CIT Vs. Ratnabai N.K. Dubhash (Mrs.) (Supra) and of Hon'ble Delhi High Court in the case of CIT Vs. SPL's Siddharth Ltd. (Supra) that requirement u/s. 153 D for obtaining approval of JCIT is not procedural only but a mandatory requirement, hence the cited decision by the Ld. D.R is not applicable in the case of present assessee. Under above circumstances, the issue raised regarding the validity of assessment orders in question without obtaining prior approval u/s. 153D of the Act is decided in favour of the assessee. The assessment orders in question are thus quashed as null and void.

16. In view of the above finding, on the validity of assessment orders in question, the other issue questioning the validity of additions/disallowances made by the A.O in the assessment orders in question does not need adjudication as the same has become academic only.

17. Consequently, appeals are allowed.

The order is pronounced in the open Court on March 2012.

Sd/-
(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER

Sd/-
(I.C. SUDHIR)
JUDICIAL MEMBER

Pune, dated the 30th March, 2012

The order is pronounced in the open Court on 30.3.2012.

Sd/-
(R.K. Panda)
AM

Sd/-
(I.C. Sudhir)
JM

US

Copy of the order is forwarded to :

1. The Appellant
2. The Respondent
3. The CIT -II, Pune
4. The CIT(A)- II,Pune
5. The D.R. "B" Bench, Pune
6. Guard File

/-True Copy-/

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Pune